

This Opinion is Not a  
Precedent of the TTAB

Mailed: January 12, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Unsalted Vacations LLC*

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Serial No. 90312784

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Matthew J. Stark of Price Henneveld LLP for Unsalted Vacations LLC.

Danielle L. Anderson, Trademark Examining Attorney, Law Office 113,<sup>1</sup>  
Myriah Habeeb, Managing Attorney.

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Before Lynch, Larkin, and Lebow,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Unsalted Vacations LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark FLOREO for services ultimately identified as “Real estate management services for properties owned by third parties” in International

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<sup>1</sup> A different examining attorney examined the application and issued the final refusals to register that are the subjects of this appeal. The application was subsequently assigned to Ms. Anderson, who filed the brief for the United States Patent and Trademark Office (“USPTO”). We will refer to them both as the “Examining Attorney.”

Class 36, and “Reservation of temporary accommodations for vacation real estate properties that are owned by third parties” in International Class 43.<sup>2</sup>

The Examining Attorney has refused registration of Applicant’s mark in both classes on two grounds: (1) under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that the mark so resembles the mark shown below



registered on the Principal Register for “Providing temporary housing accommodations” in International Class 43,<sup>3</sup> as to be likely, when used in connection with the services identified in the application, to cause confusion, to cause mistake, or to deceive; and (2) under Trademark Rules 2.32(a)(9) and 2.61(b), 37 C.F.R.

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<sup>2</sup> Application Serial No. 90312784 was filed on November 11, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark and first use of the mark in commerce in connection with the identified services at least as early as November 3, 2020.

<sup>3</sup> The cited Registration No. 5515263 issued on July 10, 2018. The registrant has disclaimed the exclusive right to use “Homes” apart from the mark as shown. The mark is described as follows: “The mark consists of a tree above the stylized word ‘FLOURISH’ which is above the stylized word ‘HOMES.’”

§§ 2.32(a)(9) and 2.61(b), on the ground that Applicant has failed to provide a proper translation of the Spanish word “floreo” into English.

Applicant appealed when the Examining Attorney made the refusals final. The case is fully briefed.<sup>4</sup> We affirm both refusals to register.

### **I. Prosecution History and Record on Appeal<sup>5</sup>**

Applicant initially sought registration of its mark for services identified as “Real estate management services” and “Reservation of temporary accommodations, namely, vacation real estate properties.”<sup>6</sup> The application was supported by a specimen of use of the mark that Applicant described as a promotional flyer for its services.<sup>7</sup>

The Examining Attorney issued an Office Action refusing registration on the basis of the cited registration, and requiring Applicant to amend its identifications of services and to provide an English translation of the foreign wording in the mark.<sup>8</sup> The Examining Attorney made of record USPTO electronic records regarding the cited registration,<sup>9</sup> pages from the United States Census Bureau website regarding

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<sup>4</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s appeal brief appears at 4 TTABVUE and its reply brief appears at 7 TTABVUE. The Examining Attorney’s brief appears at 6 TTABVUE.

<sup>5</sup> Citations in this opinion to the application record are to pages in the USPTO’s Trademark Status & Document Retrieval (“TSDR”) database.

<sup>6</sup> November 11, 2020 Application at TSDR 1.

<sup>7</sup> *Id.*

<sup>8</sup> April 20, 2021 Office Action at TSDR 1.

<sup>9</sup> *Id.* at TSDR 2-4.

the extent to which the Spanish language is spoken at home in the United States,<sup>10</sup> a page from the website at wordhippo.com translating the Spanish word “floreo” into English as “flourish,”<sup>11</sup> an English-language dictionary definition of the word “flourish,”<sup>12</sup> and pages from third-party websites that the Examining Attorney claimed show that the services identified in the application and cited registration are offered under the same mark.<sup>13</sup>

Applicant responded to the Office Action by arguing against the Section 2(d) refusal and amending its identification of services.<sup>14</sup> Applicant also argued against the requirement that it enter a translation statement, and made of record webpages that it claimed showed that the Spanish language word “floreo” has multiple meanings, and does not only or primarily mean “flourish.”<sup>15</sup>

The Examining Attorney then issued an Office Action making final the Section 2(d) refusal and the refusal based on Applicant’s failure to enter a translation statement.<sup>16</sup> The Examining Attorney made of record an additional webpage translating the Spanish word “floreo” into English as “flourish,”<sup>17</sup> a webpage

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<sup>10</sup> *Id.* at TSDR 5-6.

<sup>11</sup> *Id.* at TSDR 7.

<sup>12</sup> *Id.* at TSDR 8 (THE AMERICAN HERITAGE DICTIONARY).

<sup>13</sup> *Id.* at TSDR 9-16.

<sup>14</sup> June 17, 2021 Response to Office Action at TSDR 1.

<sup>15</sup> *Id.* at TSDR 2-31.

<sup>16</sup> July 13, 2021 Final Office Action at TSDR 1.

<sup>17</sup> *Id.* at TSDR 2 (educalingo.com).

translating the Spanish word “gato” into English,<sup>18</sup> and additional webpages that the Examining Attorney claimed showed that the services identified in the application and cited registration are offered under the same mark.<sup>19</sup>

## II. Likelihood of Confusion Refusal

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Our determination of the likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at \*29 (TTAB 2021) (citing *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24,

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<sup>18</sup> *Id.* at TSDR 34.

<sup>19</sup> *Id.* at TSDR 3-33.

29 (CCPA 1976)). Applicant argues that under these two factors, “[t]he sight, sound and meaning of the marks, when properly compared in their entirety, as well as comparison of the goods and services, leads to an overall finding of no likelihood of confusion.” 4 TTABVUE 5.

**A. Similarity or Dissimilarity of the Marks**

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *In re Embiid*, 2021 USPQ2d 577, at \*11 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1801, 1812 (TTAB 2014)).

“The proper test regarding similarity ‘is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.’” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). The average consumer here is a person or company seeking real estate management

services or the reservation of temporary accommodations for vacation real estate properties.

The Examining Attorney does not argue that the marks are confusingly similar in appearance or sound. Instead, she argues that “[e]quivalence in meaning and connotation may be sufficient to find . . . marks confusingly similar,” 6 TTABVUE 6, and that Applicant’s mark “FLOREO, which translates to ‘FLOURISH’, and the registered mark FLOURISH HOMES are confusingly similar under the doctrine of foreign equivalents.” *Id.* at 7. According to the Examining Attorney, “the entirety of [A]pplicant’s mark directly translates to the first term in the registered mark,” which means ‘to do or fare well; prosper,’” such that “both marks create the same commercial impression of prosperity.” *Id.*

Our analysis under the first *DuPont* factor thus turns primarily on whether to apply the doctrine of foreign equivalents, under which “foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks.” *Palm Bay Imps.*, 73 USPQ2d at 1696. “When it applies, the doctrine of foreign equivalents treats differently-spelled words as having the same meaning where the foreign word, when translated into English, means the same as the English word.” *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at \*6 (TTAB 2019).

“The doctrine of foreign equivalents ‘is not an absolute rule and should be viewed merely as a guideline’ that applies when it is likely that ‘the ordinary American

purchaser would ‘stop and translate [a mark] into its English equivalent.’” *In re Taverna Izakaya LLC*, 2021 USPQ2d 1134, at \*6 (TTAB 2021) (quoting *Palm Bay Imps.*, 73 USPQ2d at 1696) (internal quotation omitted). “Such ‘ordinary American purchaser’ in a case involving a foreign language mark includes purchasers knowledgeable in English as well as the pertinent foreign language(s).” *Id.* (quoting *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006)).

Applicant argues that the doctrine of foreign equivalents does not apply to its mark FLOREO. Applicant acknowledges that “floreo” is a Spanish word, and that “one of the translations of ‘floreo’ is ‘flourish,’” 4 TTABVUE 7, but argues that “[w]here the evidence shows that the English translation is not exact, literal or direct, the Doctrine of Foreign Equivalents has generally not been applied to find the marks confusingly similar,” *id.* at 6, and that “several translation dictionaries showing variations in the English meaning constitute evidence that the foreign word or term may not have a literal and direct translation, and the Doctrine should not be applied.” *Id.* at 7. According to Applicant, it has “provided evidence on the record showing that ‘floreo’ has many other translations and meanings” in addition to “flourish.” *Id.* Applicant cites *In re Buckner Enters. Corp.*, 6 USPQ2d 1316 (TTAB 1987), in support of its argument that “the existence of these additional and alternative translations of the word ‘floreo,’ prevents a proper application of the Doctrine of Foreign Equivalents.” *Id.* at 8.

Applicant also argues that “it is unlikely that a purchaser would translate the mark [FLOREO]” because “the word ‘FLOREO’ has not been significantly used in almost 200 years, with the last significant usage occurring shortly after 1828.” *Id.*

Applicant concludes that “[b]ased upon the multiple and alternative translations of the term ‘FLOREO’ provided with [Applicant’s] evidence on the record, as well as the evidence of lack of usage of the term ‘FLOREO,’” the word “‘FLOREO’ does not have a literal and direct English translation,” *id.*, and that “the Doctrine of Foreign Equivalents should not have been applied in this case and the term ‘FLOREO’ on its face, should be analyzed against the FLOURISH HOMES mark to determine whether a likelihood of confusion exists.” *Id.* at 9.

The Examining Attorney responds that the doctrine of foreign equivalents applies because the record evidence of the meaning of the Spanish word “floreo,” including evidence submitted by Applicant, establishes that the meaning of “floreo” is “flourish,” 6 TTABVUE at 9-10, and “[t]here is no evidence in the record to support an assertion that consumers will ascribe any of the other possible meanings to FLOREO [but] there is evidence in the record to support the determination that the applied-for mark will be translated into English as FLOURISH.” *Id.* at 11. The Examining Attorney further argues that “FLOURISH is the first translation listed in all except one of the translation evidence provided” and that Applicant’s “own advertising indicates that [A]pplicant is using the term FLOREO to mean FLOURISH,” and “reinforces to consumers that the translation of FLOREO is FLOURISH, as opposed to any other possible meaning.” *Id.*

With respect to Applicant's argument regarding the infrequency of the use of the word "floreo" in Spanish, the Examining Attorney argues that the "frequency with which a term is used in general speech does not indicate whether an ordinary American purchaser proficient in Spanish would recognize and translate the term," and that "Applicant cites to no authority for its position that the doctrine of foreign equivalents is only relevant for terms that are frequently used," making Applicant's argument "purely speculative and thus entitled to no weight." *Id.*

The Examining Attorney concludes that "the term FLOREO directly translates to the English word FLOURISH and the evidence from the American Heritage dictionary establishes that FLOURISH means 'to do or fare well; prosper,'" and "the fact that the marks do not look or sound similar does not obviate the similarity of the marks for purposes of Section 2(d) as the marks do, in fact, both create the same commercial impression of prosperity." *Id.* at 12.

As noted above, Applicant acknowledges that "floreo" is a Spanish word, and the Board has "consistently found that Spanish is a 'common language' in the United States, and [has] routinely applied the doctrine of foreign equivalents to Spanish-language marks." *Ricardo Media*, 2019 USPQ2d 311355, at \*7 (citing *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1127 (TTAB 2015); *In re Peregrina Ltd.*, 86 USPQ2d 1645, 1648 (TTAB 2008); *In re Perez*, 21 USPQ2d 1075 (TTAB 1991); *In re Am. Safety Razor Co.*, 2 USPQ2d 1459 (TTAB 1987); *In re Hub Distrib., Inc.*, 218 USPQ 284 (TTAB 1083); *Rosenblum v. George Willsher & Co.*, 161 USPQ 492 (TTAB 1969)).<sup>20</sup>

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<sup>20</sup> The Examining Attorney made of record a United States Census Bureau webpage entitled "Detailed Languages Spoken at Home and Ability to Speak English for the Population 5

As also noted above, Applicant “has at no time refuted that one of the translations of ‘floreo’ is ‘flourish,’” 4 TTABVUE 7, but argues that we should not apply the doctrine of foreign equivalents to its mark for two reasons: (1) there are multiple other definitions of the word, and (2) the word is an obscure one in the Spanish-language vernacular. We address these arguments in turn.

Applicant claims “that ‘floreo’ has many other translations and meanings,” *id.*, such as “witty but insubstantial talk” and “chatter,” *id.*, but that fact alone does not preclude the application of the doctrine of foreign equivalents. *Perez*, 21 USPQ2d at 1076. The record contains several definitions of “floreo” that list “flourish” as the first meaning of the word,<sup>21</sup> and also shows that “floreo” is the first-person singular, present-tense conjugation of the Spanish verb “florear,” which means “to flourish,” “to flower,” and “to blossom.”<sup>22</sup>

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Years and Over: 2009-2013,” April 20, 2021 Office Action at TSDR 5-6, which shows that over 37 million people in the United States spoke Spanish at home during the period of the study. In *Ricardo Media*, the Board took judicial notice of the August 2013 United States Census Bureau’s report entitled “Language Use in the United States: 2011,” which indicated that “after English, Spanish is the most commonly spoken language in the United States, and that over 12% of the United States population speaks Spanish.” *Ricardo Media*, 2019 USPQ2d 311355, at \*7.

<sup>21</sup> April 20, 2021 Office Action at TSDR 7 (wordhippo.com); June 17, 2021 Response to Office Action at TSDR 24 (COLLINS ENGLISH-SPANISH DICTIONARY), 27 (OXFORD SPANISH DICTIONARY), 30 (YOUR DICTIONARY/THE AMERICAN HERITAGE SPANISH DICTIONARY); July 13, 2021 Final Office Action at TSDR 2 (educalingo.com). The OXFORD SPANISH DICTIONARY translates the English word “flourish” into Spanish as “floreo.” June 17, 2021 Response to Office Action at TSDR 27.

<sup>22</sup> June 17, 2021 Response to Office Action at TSDR 27 (OXFORD SPANISH DICTIONARY), 28 (PONS DICTIONARY). The website at educalingo.com, on which Applicant relies, 4 TTABVUE 7, states that the word “floreo” is derived from the verb “florear,” June 17, 2021 Response to Office Action at TSDR 2, and refers specifically to the English word “flourish” in discussing various meanings of “floreo” in Spanish. *Id.* at TSDR 4. The COLLINS SPANISH-ENGLISH DICTIONARY states that “florear” is a term related to “floreo.” *Id.* at TSDR 25.

In determining which of the several definitions of “floreo” is most likely to be understood by Spanish-speaking consumers viewing the word used as Applicant’s mark for the services identified in the application, we may consider Applicant’s commercial use of the mark, including in its specimen. *Aquamar*, 115 USPQ2d at 1127; *Perez*, 21 USPQ2d at 1076 (“Undercutting applicant’s argument that the Spanish word ‘gallo’ has meanings other than ‘rooster’, and, thus, is not the foreign equivalent of registrant’s mark, is the usage of applicant’s mark in the commercial marketplace, as evidenced by the specimens of record,” which “depict applicant’s marks with a prominent representation of a rooster.”).

Applicant’s specimen of use, which Applicant describes as a promotional flyer for its services,<sup>23</sup> displays the FLOREO mark at the top of the first page, as shown below



and Applicant identifies itself as “Floreo” in the body of the flyer, which ends with the following text on the second page:

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<sup>23</sup> November 11, 2020 Application at TSDR 1.

<sup>24</sup> *Id.* at TSDR 3.



The Examining Attorney argues that Applicant's use of "flourish" in the concluding sentence in the flyer "reinforces to consumers that the translation of FLOREO is FLOURISH, as opposed to any other possible meaning." 6 TTABVUE 11. Applicant's reply brief does not address its brochure or this argument. Applicant's silence is a tacit admission that its use of the word "flourish" in its flyer as a "bookend" to "Floreo" was not happenstance, but was instead intended to associate Applicant's Spanish-language mark "Floreo" with the English word "flourish." Applicant's flyer "would certainly reinforce to consumers in the marketplace the ['flourish'] translation of ['floreo'] as opposed to the other English meanings of [the word]," *Perez*, 21 USPQ2d at 1077, and "[w]hile the Spanish term ['floreo'] may also have other English translations, there is no support for the argument that the other English meanings of ['floreo'] would be ascribed to [Applicant's mark] by purchasers" who are exposed to Applicant's brochure. *Id.* at 1076.

Applicant relies primarily on the Board's decisions in *Buckner*, 4 TTABVUE 7-8; 7 TTABVUE 2, and in *In re Tia Maria, Inc.*, 188 USPQ 524 (TTAB 1975), 4 TTABVUE

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<sup>25</sup> *Id.* at TSDR 4.

8; 7 TTABVUE 2-3, to avoid the application of the doctrine of foreign equivalents. In *Buckner*, the Board found that the doctrine of foreign equivalents did not apply to the applicant's Spanish-language mark PALOMA where PALOMA and the cited mark DOVE were not exact synonyms because the "Spanish word 'paloma' has a broader meaning than the English word 'dove' in that 'paloma' also includes 'pigeon.'" *Buckner*, 6 USPQ2d at 1317. The Board noted that in "English, the words 'dove' and 'pigeon' are understood to mean two different, although related, birds," and held that the Board "must apply an equally stringent test in judging similarity of meaning between a foreign word (paloma) and an English word (dove) as it would between two English words (e.g. pigeon and dove). The words 'pigeon' and 'dove' are not synonyms, much less exact synonyms." *Id.*

*Buckner* is inapposite here because although "flourish" is not the only translation of "floreo," it is a direct one, as reflected in Applicant's admission that "one of the translations of 'floreo' is 'flourish,'" 4 TTABVUE 7, and it is the translation that Applicant alludes to in its specimen. The word "floreo" also lacks the sort of ambiguity in meaning associated with the Spanish word "paloma" at issue in *Buckner* and with the Spanish word "posada" at issue in *In re Pan Tex. Hotel Corp.*, 190 USPQ 109 (TTAB 1976), in which the Board found that LA POSADA was not merely descriptive of lodging and restaurant services because while "posada" was the Spanish word for "inn" and the applicant operated an inn, the word "posada" "carries the added implication of a home or dwelling, and thus has a connotative flavor which is slightly different from that of the words 'the inn.'" *Id.* at 110. We find that the existence of

meanings of “floreo” in addition to “flourish” does not preclude the application of the doctrine of foreign equivalents to Applicant’s mark because “flourish” is the literal and direct translation most likely to be associated with it.

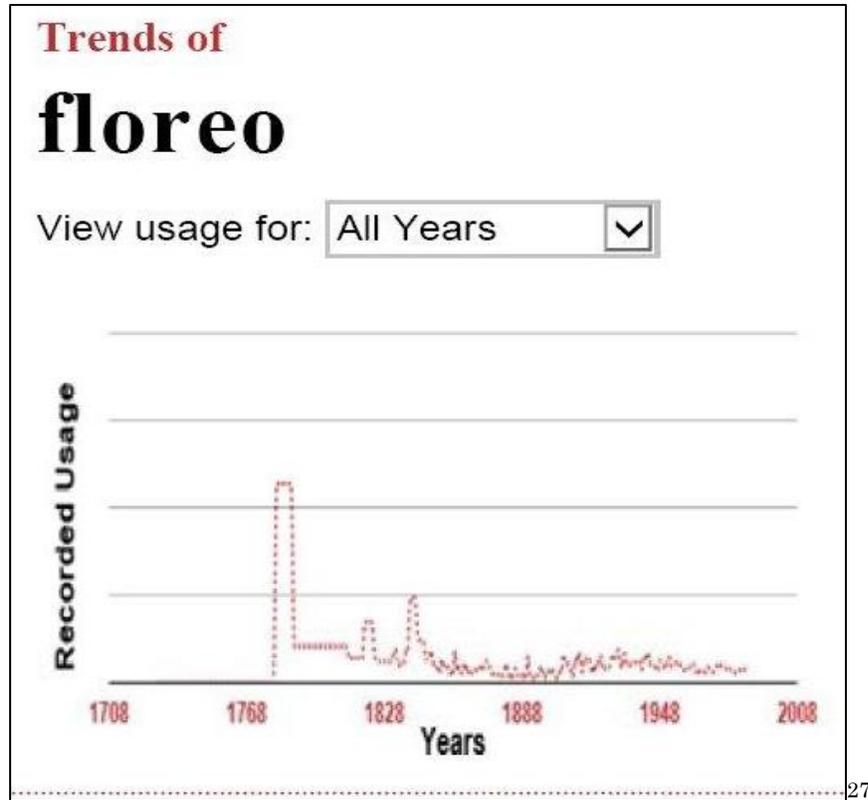
Applicant cites *Tia Maria* in support of its second argument that it is unlikely that Spanish speakers would “stop and translate” FLOREO because the word is rarely used, 4 TTABVUE 8, but that case similarly does not aid Applicant. In *Tia Maria*, the Board did not hold that consumers would not stop and translate the Spanish-language mark TIA MARIA into English as “Aunt Mary” because “Tia Maria” was an obscure Spanish phrase. To the contrary, the Board found that “Tia Maria” was one of those common foreign expressions “that even those familiar with the language will not translate, accepting the term as it is . . . .” *Tia Maria*, 188 USPQ at 525.

The Board has suggested that where a word in a foreign language is obscure, a consumer may not stop and translate it. *Cf. Peregrina*, 86 USPQ2d at 1648 (consumers were likely to stop and translate Spanish word “peregrina” into English as “pilgrim” where there was “no question that the translated meaning of LA PEREGRINA is not obscure.”). *See also In re Isabella Fiore, LLC*, 75 USPQ2d 1564, 1569 (TTAB 2005) (in finding that FIORE was not primarily merely a surname because it meant “flower” in Italian, the Board applied the doctrine of foreign equivalents and noted that “this is not a case where the surname’s non-surname meaning in Italian is obscure.”). But even though the obscurity of a word per se may cause foreign-language speakers not to stop and translate it, the record does not show that “floreo” is such an obscure Spanish word.

Applicant's own use of "Floreo" and "flourish" together in its specimen, and the appearance of the word "floreo" in modern Spanish dictionaries, suggest that "floreo" is in use in modern Spanish. Applicant argues nevertheless that a page from the website of the COLLINS ENGLISH DICTIONARY shows that the word "has not been significantly used in almost 200 years, with the last significant usage occurring shortly after 1828." 4 TTABVUE 8.<sup>26</sup> Applicant goes even further in its reply brief, where it argues that "the fact that the term has not been used in the past 200 years is certainly probative of" whether consumers would stop and translate FLOREO. 7 TTABVUE 3. We reproduce below the page on which Applicant relies:

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<sup>26</sup> Applicant attached various pages from online dictionaries, including the cited page, to its appeal brief. 4 TTABVUE 14-43. The Board strongly discourages this practice. "Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or convenience to the Board. It is neither." *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014). As the Board explained in *Michalko*, "[w]hen considering a case for final disposition, the entire record is available to the panel," and "[b]ecause we must determine whether attachments to briefs are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during the prosecution of the application," which requires "more time and effort than would have been necessary if citations directly to the prosecution history were provided." *Id.* at 1950-51.



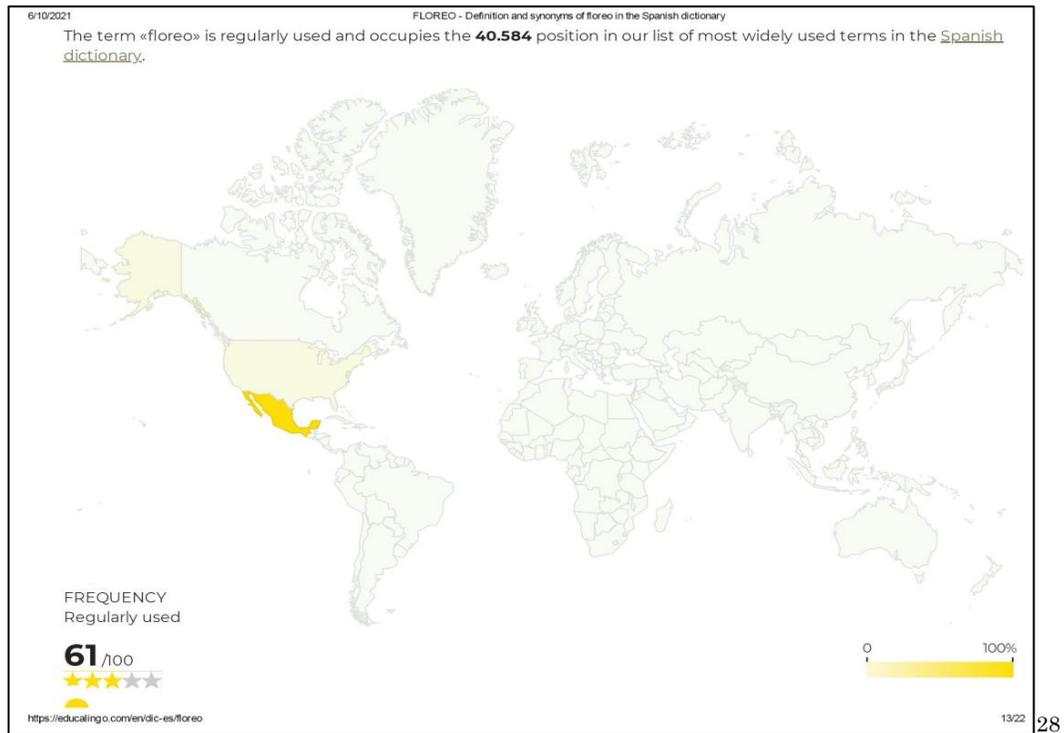
This graph does not contain any information on its y-axis about the number of uses for the referenced years, making it impossible to determine the frequency of use of “floreo” in absolute terms at any point, or to determine, in absolute terms, how much less the word has been used between 1828 and 2008, and it contains no information about the frequency of the use of “floreo” today. The graph does not show that the word “floreo” is obscure in modern Spanish, much less that it “has not been used in the past 200 years.” *Id.*

Applicant made of record another website that contradicts its claims that “floreo” is obscure. As shown below, the website at [educalingo.com](http://educalingo.com) states that “[t]he term <<floreo>> is regularly used and occupies the 40.584 position in our list of most widely

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<sup>27</sup> June 17, 2021 Response to Office Action at TSDR 24.

used terms in the Spanish dictionary,” and displays a map whose legend states that “floreo” is “Regularly used” in Mexico, the country of origin of numerous Spanish speakers in the United States, and in the polyglot United States.



Given Applicant’s own implicit translation of the word “floreo” as “flourish” in its specimen, and the word’s presence in modern Spanish-language dictionaries, we cannot find on this record that “floreo” is used so infrequently today that a Spanish speaker in the United States would not stop and translate it.

On the basis of the record as a whole, we find that the Examining Attorney properly applied the doctrine of foreign equivalents to Applicant’s mark FLOREO, and that for purposes of determining the similarity of the marks in connotation and commercial impression, we may treat Applicant’s mark as the foreign equivalent of

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<sup>28</sup> *Id.* at TSDR 14.

the English word “flourish.” That does not end our analysis under the first *DuPont* factor, however, because the cited mark is not “Flourish” alone. We must determine whether the marks are similar in meaning when they are considered in their entireties and, if so, whether that similarity in meaning outweighs any dissimilarities in appearance and sound. *Aquamar*, 115 USPQ2d at 1127. For ease of reference in following our analysis, we reproduce the cited mark below:



The marks must be considered in their entireties, but “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).

The cited mark consists of a design element and the stylized words “Flourish” and “Homes.” In the case of marks “consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater

impression upon purchasers, to be remembered by them, and to be used by them to request the goods [or services].” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)). The general principle discussed in *Aquitaine Wine USA* applies here because the design element in the cited mark, a tree whose lush branches and leaves are similar to the font in which the word “Flourish” is displayed, with the tree roots even serving as part of that font, serves to reinforce that word, which means, among other things, “to grow well or luxuriantly; thrive.”<sup>29</sup> See *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*33-34 (TTAB 2021).

As between the words “Flourish” and “Homes,” the word “Flourish” is the first word in the mark and it is prominently displayed in all capital letters above the word “Homes.” These attributes of the word “Flourish” together “establish[ ] its prominence” within the mark. *Aquitaine Wine USA*, 126 USPQ2d at 1185. “Flourish” is also the only word that has source-identifying significance because “Homes” is at least descriptive of a feature of the services identified in the cited registration as “Providing temporary housing accommodations,” and has been disclaimed. See *Detroit Athletic Co.*, 127 USPQ2d at 1050 (“the non-source identifying nature of the words ‘Co.’ and ‘Club’ and the disclaimers thereof constitute rational reasons for giving those terms less weight in the analysis.”).

We find that the word “Flourish” is the dominant portion of the cited mark, and it is the English-language equivalent of Applicant’s mark FLOREO. Accordingly, the

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<sup>29</sup> April 20, 2021 Office Action at TSDR 8 (THE AMERICAN HERITAGE DICTIONARY).

marks are very similar, if not identical, in connotation and commercial impression when they are considered in their entireties, and greater weight is given in that comparison to the word “Flourish” in the cited mark than to its other elements. At the same time, we recognize “that the marks’ ‘equivalency in connotation does not, in and of itself, determine the question of likelihood of confusion in this case [because] the similarity in connotation must be viewed as but a single factor in the overall evaluation of likelihood of confusion.” *Aquamar*, 115 USPQ2d at 1127 (quoting *In re Ithaca Indus., Inc.*, 230 USPQ 702, 704 (TTAB 1986)). We thus turn to the issue of the similarity or dissimilarity of the marks in appearance and sound.

Applicant argues that “[w]ith respect to the sight comparison of the applied-for mark and the mark of the cited registration, the spellings of these two words are completely different and have different overall visual impressions,” that “FLOREO and FLOURISH HOMES have an unmistakably different visual impression,” and that “[s]imilarly, the sound of the two marks is also significantly different [because] FLOREO and FLOURISH HOMES have very different sounds and share only a minor similarity at the beginning of each of the words [and] the remainder of the marks is entirely different and has an entirely different sound.” 4 TTABVUE 10.

The Examining Attorney does not address Applicant’s arguments regarding the dissimilarity of the marks in sound, but does dispute that the dissimilarity in appearance is sufficient to makes the marks dissimilar overall despite their similarity in meaning. She argues that “Applicant’s mark is in standard characters and can be displayed in any form, including the stylization and design used in the registered

mark. Therefore, the stylization and design used in the registered mark does not overcome a likelihood of confusion under Section 2(d).” 6 TTABVUE 9.

With respect to appearance, we agree with the Examining Attorney that Applicant’s standard-character mark FLOREO could be depicted in the same size and arched font style as the word “Flourish” in the cited mark.<sup>30</sup> A consumer with a “general rather than a specific impression” of the cited mark, *Embiid*, 2021 USPQ2d 577, at \*11, who separately encounters Applicant’s mark FLOREO displayed in the same arched font as the word “Flourish” in the cited mark, could view Applicant’s mark as being similar to the cited mark as recalled in the mind’s eye of the consumer. Applicant’s mark FLOREO and the dominant word “Flourish” in the cited mark both begin with the same three letters “F-L-O” and contain the letter “R,” and we disagree with Applicant that “the spellings of these two words are completely different.” 4 TTABVUE 10. The differences in spelling that might be apparent on a side-by-side comparison of the marks may not be noticed when the marks are separately considered, particularly because those differences may be obscured in the mind’s eye of a consumer with a general rather than a specific impression of the cited mark by

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<sup>30</sup> The Examining Attorney argues that the mark “can be displayed in any form, including the stylization and design used in the registered mark.” 6 TTABVUE 9. It is not clear exactly what she means by “design,” but we cannot assume that Applicant’s mark could be displayed together **with** the tree design in the cited mark because “when we are comparing a standard character mark to a word + design mark for Section 2(d) purposes, we will consider variations of the depictions of the standard character mark *only with regard to* ‘font style, size, or color’ of the ‘words, letters, numbers, or any combination thereof.’” *Aquitaine Wine USA*, 126 USPQ2d at 1187 (emphasis in original) (citing *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *Viterra*, 101 USPQ2d at 1909).

the highly stylized font in which the word “Flourish” is displayed in the cited mark. At most, the marks may be somewhat more dissimilar than similar in appearance.

Applicant’s argument for dissimilarity in sound assumes that the cited mark will be verbalized as “Flourish Homes,” *id.*, which ignores “the penchant of consumers to shorten marks.” *Sabhnani*, 2021 USPQ2d 1241, at \*36 (quoting *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J. concurring: “the users of language have a universal habit of shortening full names — from haste or laziness or just economy of words”)). “[I]t is reasonable to assume that such a practice would lead many consumers to drop the highly descriptive/generic term [‘homes’] when” referring to the registrant’s services. *Bay State Brewing*, 117 USPQ2d at 1961. In that instance, the cited mark will be verbalized simply as “Flourish,” which is at least somewhat similar in sound to “Floreo” because both marks begin with a syllable pronounced identically in the manner of the English word “floor.” But even if the cited mark is verbalized as “Flourish Homes,” we disagree with Applicant that “FLOREO and FLOURISH HOMES have very different sounds,” 4 TTABVUE 10, because of the aural similarity between “Floreo” and the dominant word “Flourish” in the cited mark. The marks are, at most, somewhat more dissimilar than similar in sound.

But “even when there are differences in the sound and appearance of two marks, likelihood of confusion can be found when the equivalency in meaning or connotation outweighs the differences in the marks.” *Aquamar*, 115 USPQ2d at 1127-28. *See* 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:36 (5th ed. June 2021

update) (“The rationale of the doctrine of foreign equivalents is that a foreign, non-English word familiar to an appreciable segment of American purchasers may be confusingly similar to its English equivalent.”). Under the doctrine of foreign equivalents, the Board has found confusing similarity between marks that were far more different in sound and appearance than those here. *See, e.g., Aquamar*, 115 USPQ2d at 1127-28 (MARAZUL and BLUE SEA found to be similar); *Peregrina*, 86 USPQ2d at 1649-50 (LA PEREGRINA and PILGRIM found to be similar); *Perez*, 21 USPQ2d at 1077 (EL GALLO and ROOSTER found to be similar); *Am. Safety Razor Co.*, 2 USPQ2d at 1460 (BUENOS DIAS and GOOD MORNING found to be similar); *Rosenblum*, 161 USPQ at 492-93 (RED BULL and TORO ROJO found to be similar). Although the dissimilarities in appearance and sound between Applicant’s mark and the cited mark outweigh their similarities, the marks are not so dissimilar in those means of comparison to make confusion unlikely where they have essentially the same meaning. We find that the first *DuPont* factor supports a finding of a likelihood of confusion.

**B. Similarity or Dissimilarity of the Services and Channels of Trade**

The second and third *DuPont* factors respectively consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” and “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Detroit Athletic Co.*, 128 USPQ2d at 1051-52 (quoting *DuPont*, 177 USPQ at 567).

The “involved services need not be identical or even competitive to find a likelihood of confusion.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*4 (TTAB 2019) (citing *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)). “They need only be ‘related’ in some manner and/or if the circumstance surrounding their marketing are such that they could give rise to the mistaken belief that [the services] emanate from the same source.” *Id.* (quoting *Coach Servs, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation omitted)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods [or services] are used together or used by the same purchasers; advertisements showing that the relevant goods [or services] are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods [or services] and the goods [or services] listed in the cited registration.

*Embiid*, 2021 USPQ2d 577, at \*22-23 (quoting *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*5 (TTAB 2020)).

The services identified in the cited registration are “Providing temporary housing accommodations” in Class 43, while the services identified in the application are “Real estate management services for properties owned by third parties” in Class 36, and “Reservation of temporary accommodations for vacation real estate properties that are owned by third parties” in Class 43.

Applicant argues that it “has amended the description of goods and services for the applied-for mark to recite that each class is directed toward property ‘owned by

third parties’,” 4 TTABVUE 11, and that the amended identifications “specify that the applied-for mark is related to services that are distinct from those of the registered mark, are used by different classes of consumers and are offered in different channels of trade.” *Id.* According to Applicant, the cited registrant “is ‘providing’ the housing accommodations” directly to its customers, *id.*, while Applicant “does not ‘provide’ any accommodations, but rather places a consumer in communication with the third-party provider of accommodations.” *Id.* With respect to its Class 36 property management services, Applicant argues that it “does not own or provide any real estate or other housing accommodations” and “only provides services that assist providers of temporary housing accommodations, such as the Registrant, in managing a property.” *Id.* Applicant concludes that “there is little overlap between the services of the cited registration and the services of the applied-for mark.” *Id.* at 12.

The Examining Attorney responds that Applicant’s “real estate management and accommodation reservation services are related to registrant’s provision of housing accommodations,” 6 TTABVUE 13, based on third-party webpages showing “that the same entity commonly provides the relevant services and markets the services under the same mark.” *Id.* at 14. She argues that the “temporary accommodation services identified in the registration are not limited to those owned by the registrant, and therefore, could include providing temporary accommodations in properties owned by third parties,” *id.* at 16, and that “the same entity commonly provides management

and reservation booking for third parties and also provides temporary accommodations.” *Id.*

### **1. Applicant’s Class 43 Services**

Although Applicant has limited the scope of the services identified in the application to management and reservation of properties “owned by third parties,” the identification of services in the cited registration, “Providing temporary housing accommodations,” contains no such limitation. We agree with the Examining Attorney that those services could involve temporary housing accommodations in the form of “vacation real estate properties that are owned by third parties,” and we reject Applicant’s suggestion that the use of the word “providing” in the identification limits the identified services to temporary housing accommodations owned by the registrant.

We “may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format or have regular fixed editions.” *Taverna Izakaya*. 2021 USPQ2d 1134, at \*9 n.21. We take judicial notice that the verb “provide,” from which the gerund “providing” is derived, means “to supply or make available (something wanted or needed),” and that “reservation” means “an arrangement to have something (such as a hotel room) held for one’s use.”<sup>31</sup> The registrant could “provid[e] temporary housing accommodations” by making such accommodations available to its customer through its “reservation” of “temporary

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<sup>31</sup> MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on January 11, 2022).

accommodations for vacation real estate properties that are owned by third parties,” in functionally the same manner in which Applicant claims that it provides its Class 43 services. 4 TTABVUE 11.

On its face, the identification of services in the cited registration is broad enough to encompass the Class 43 services identified in the application as the “Reservation of temporary accommodations for vacation real estate properties that are owned by third parties,” making the respective Class 43 services legally identical. *See In re Info. Builders Inc.*, 2020 USPQ2d 10444, at \*3 (TTAB 2020). If the services are deemed to be legally identical, “we must presume that [they] travel through the same channels of trade and are offered or rendered to the same or overlapping classes of purchasers.” *Id.*

Even if the Class 43 services are not legally identical, however, the services of “Providing temporary housing accommodations” and “Reservation of temporary accommodations for vacation real estate properties that are owned by third parties” are intrinsically closely related, based on the language of the identifications alone, because both sets of services involve making available temporary housing accommodations. *Cf. Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002) (finding that even though the opposer “did not present evidence of relatedness beyond the descriptions in the application and registration[s],” the “data and information processing” description in applicant’s application was very similar to the opposer’s registrations “covering consulting services, whether for data processing or for data processing products,” the “electronic

transmission of data and documents via computer terminals” identification in the applicant’s application was very similar to the opposer’s registrations “covering facsimile machines, computers, and computer software,” and the “conversion from one media form to another media” identification in the applicant’s application was similar to the opposer’s registrations “covering programs for information manipulation and apparatus for data acquisition and processing.”). “We find that the identifications in the application and registration themselves support finding the [Class 43] services are related.” *Country Oven*, 2019 USPQ2d 443903, at \*6. We find that the second and third *DuPont* factors support a finding of a likelihood of confusion as to the Class 43 portion of Applicant’s application.

## **2. Applicant’s Class 36 Services**

With respect to the services identified in the Class 36 portion of the application, the record shows that they are related to the Class 43 services identified in the cited registration because they commonly emanate from the same source under the same mark as the other or similar services. We have found above that Applicant’s Class 43 services are legally identical to, and otherwise intrinsically closely related to, the services identified in the cited registration, and Applicant’s inclusion of both the Class 36 real estate management services, and the Class 43 “Reservation of temporary accommodations for vacation real estate properties that are owned by third parties” services in its own application is itself some evidence that Applicant’s Class 36 services are related to the services identified in the cited registration. *Cf. Country Oven*, 2019 USPQ2d 443903, at \*11 (the applicant’s own use of its mark on its bakery

website in connection with the sale of bakery products bolstered the Board's finding of relatedness between those goods and services).

The Examining Attorney also made of record third-party webpages in which companies offer, under the same mark, "Real estate management services for properties owned by third parties" and some form of "Providing temporary housing accommodations," including "Reservation of temporary accommodations for vacation real estate properties that are owned by third parties." Applicant does not address this evidence in its discussion of the second *DuPont* factor. 4 TTABVUE 11-12.

Royal Shell, a self-described "professional rental and management company," offers "rental management" for property owners as well as "vacation rental" services allowing "Online Booking 24/7."<sup>32</sup> Wintergreen Resort similarly provides property management services for property owners as well as services allowing property owners to "make their condominiums and homes available for short-term rental through the resort's reservation system."<sup>33</sup> Turnkey provides "Luxury Home Management" as well as "the Smarter Way to Vacation Rental."<sup>34</sup> Dockside Realty, which describes itself as a "full service Property Management company,"<sup>35</sup> provides vacation rental services.<sup>36</sup>

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<sup>32</sup> July 13, 2021 Final Office Action at TSDR 3-5.

<sup>33</sup> *Id.* at TSDR 6.

<sup>34</sup> *Id.* at TSDR 9.

<sup>35</sup> *Id.* at TSDR 11.

<sup>36</sup> *Id.* at TSDR 11-13.

Atlas Lane provides “Boutique Property Management” and listings of “Available Rentals.”<sup>37</sup> VacationRentalPros calls itself “one of the fastest-growing vacation rental management companies in the United States,” and claims that “[b]oth our rental guests and our property owners are delighted with our service, and they tell their friends about us.”<sup>38</sup> 30A Escapes provides “Property Management Services” as well as “Luxury Vacation Rentals.”<sup>39</sup> Gulf Coast Property Management touts its ability to “Rent Properties in 19 Days or Less.”<sup>40</sup>

Northern Michigan Escapes provides “Professional Rental Management” as well as “Vacation Rentals.”<sup>41</sup> Nomadic Real Estate provides “Property Management” as well as “DC Area Rentals.”<sup>42</sup> Columbia Property Management provides property management and rental listings.<sup>43</sup>

This Internet evidence shows that “Real estate management services for properties owned by third parties” are commonly offered by companies that also make the properties available as temporary accommodations, and that those services are related and are offered in the same channels of trade by property management companies to the same customers (property owners).<sup>44</sup> *See Country Oven*, 2019

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<sup>37</sup> *Id.* at TSDR 14-15.

<sup>38</sup> *Id.* at TSDR 16.

<sup>39</sup> *Id.* at TSDR 18-20.

<sup>40</sup> *Id.* at TSDR 21.

<sup>41</sup> *Id.* at TSDR 24-26.

<sup>42</sup> *Id.* at TSDR 27-28.

<sup>43</sup> *Id.* at TSDR 32-33.

<sup>44</sup> Although persons seeking temporary accommodations in the form of rentals may use the websites to reserve rental properties, the services that the property managers provide in

USPQ2d 443903, at \*10-11; *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-03 (TTAB 2009). We find that the second and third *DuPont* factors support a finding of a likelihood of confusion as to the Class 36 services in the application.

### C. Summary

The relevant *DuPont* factors all support a finding of a likelihood of confusion as to the services identified in Classes 36 and 43 in the application. The marks are very similar in connotation and commercial impression under the doctrine of foreign equivalents, and that similarity outweighs any dissimilarities in appearance and sound. The Class 43 services in the application are legally identical to, or at least intrinsically closely related to, the services identified in the cited registration, and must be deemed to be offered to the same or at least overlapping consumers through the same or at least overlapping channels of trade. The record shows that companies commonly offer both the Class 36 property management services in the application and services relating to providing temporary accommodations through the renting of the managed properties, and that these services are offered through the same channels of trade. We find, on the basis of the record as a whole, that consumers who are familiar with the cited mark for “Providing temporary housing accommodations” who separately encounter Applicant’s mark FLOREO for “Real estate management services for properties owned by third parties” or “Reservation of temporary

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making the properties that they manage available to third parties for renting are rendered primarily to the property owners themselves because the property management companies also rent out the properties that they manage for the property owners.

accommodations for vacation real estate properties that are owned by third parties” are likely to believe mistakenly that the services originate from the same source.

### III. Translation Statement Refusal

“Trademark Rule 2.32(a)(9) requires applications for marks including non-English wording to include an English translation of that wording.” *Aquamar*, 115 USPQ2d at 1125. In its appeal brief, Applicant rejects the Examining Attorney’s request that it enter a translation statement reading “The English translation of ‘FLOREO’ in the mark is ‘FLOURISH’” on the ground that “this is an incomplete and inaccurate statement of the translation with respect to the word ‘FLOREO.’” 4 TTABVue 12. Applicant offers the following translation statement instead:

The English translation of “FLOREO” in the mark can be “vain and hobby conversation,” “vain and superfluous used for no other purpose than to boast of wit or to flatter or flatter the listener or just for mere pastime,” “the Spanish dance including swinging movement of one foot in the air while the other remain on the ground,” “flourish,” “witty but insubstantial talk,” “chatter or small talk,” “ornament,” “quip or jest” and translated as used in the phrase “to beat about the bush.”

*Id.* Applicant justifies this statement on the ground that “[e]ach of these translations is included within the evidence on the record as provided by [Applicant]” in its response to the initial Office Action. *Id.*

The Examining Attorney responds that Applicant’s “proposed translation is too verbose to be appropriate for printing and is in need of clarification in order for the statement to be clear and concise,” and that the record shows that “FLOREO directly translations [sic] to FLOURISH,” that “[e]ven the evidence submitted by [Applicant]

clearly establishes that this is the primary translation into English,” and that Applicant’s “own usage of the mark in the marketplace supports the determination that an acceptable translation of the term FLOREO is FLOURISH.” 6 TTABVUE 17.

We agree with the Examining Attorney. As discussed above, the record shows that “flourish” is a direct translation of the Spanish word “floreo,” and Applicant made that very connection in its own promotional flyer. Applicant’s “failure to comply with the requirement to include an English translation of the non-English wording comprising its mark is affirmed.” *Aquamar*, 115 USPQ2d at 1125.

**Decision:** The refusals to register are both affirmed.